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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1949

NIXON HOTEL, INC.,

Petitioner,

vs.

REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER, PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Questions Presented

1. Does this case present such special and important issues that the Court should assume jurisdiction?

2. Has the Respondent acting pursuant to the Pennsylvania Eminent Domain Code denied the Petitioner due process and equal protection of the law?

Argument

The grant of review on certiorari is discretionary and not a matter of right. The same should be granted only where special and important issues are presented. It is

respectfully submitted that such justification for certiorari is totally lacking in the instant case.

The Petitioner, Nixon Hotel, Inc., hereinafter called "Hotel" is a condemnee pursuant to a Declaration of Taking filed by the Respondent, Redevelopment Authority of the City of Butler, hereinafter called "Authority". The Hotel filed Preliminary Objections and contended therein that the Hotel was not a blighted property and further that the Authority had acted in bad faith, unreasonably, arbitrarily, capriciously, and discriminatorily. The Hotel set forth as a basis for these allegations that the Authority did not allow the Hotel voluntary self-rehabilitation and that certain properties were excluded but the Hotel was not excluded from acquisition and demolition. Initially the position of the Hotel was comparable to that of the condemnees in *Berman v. Parker*, 348 U. S. 26, 75 S. Ct. 98 and *Crawford v. Redevelopment Authority*, 211 A2d 866, 418 Pa. 549. Subsequently the Hotel was permitted to amend the Preliminary Objections and alleged the area was not blighted. The Court of Common Pleas of Butler County, on the demand of the Hotel, granted a trial by jury of the factual issues raised by these Preliminary Objections. This Petition results from that preliminary factual determination. The matter has now been in litigation four and one-half (4½) years and the Preliminary Objections are not yet resolved.

Two issues relied upon herein were specifically submitted to the jury for their determination. 1) Was the area blighted and 2) Did the Authority act in bad faith and capriciously. The jury verdict was in favor of the Authority. There is no overriding special or important issue raised by this Petition.

Was the Hotel afforded due process and equal protection of laws?

Historically, the Sovereign has inherently been vested with the right of Eminent Domain. In the United States, under the Fifth and Fourteenth Amendments to the Constitution, the individual is guaranteed that he shall not be deprived of his property without due process of law. The individual holds property subject to the Soverign's right of Eminent Domain. If that power is properly exercised pursuant to statutory authority and in compliance with established requisites, therefor it constitutes due process. *Hays v. Port of Seattle*, 251 U. S. 233, 64 L. Ed. 243, 40 S. Ct. 125.

The PENNSYLVANIA URBAN REDEVELOPMENT LAW 1945, May 24, P. L. 991, Section 12, 35 P. S. Section 1712, vests the power of Eminent Domain in the Redevelopment Authortiy of the City of Butler. All acts taken by the Authority have been in conformity with that Act and the PENNSYLVANIA EMINENT DOMAIN CODE 1964, Special Sess. June 22, P. L. 84, Article I, Section 101, 26 P. S. Section 1-101. The Petitioner questions whether the exercise of that power by the Authority complies with the fair play standards of due process and equal protection of the laws.

The Petitioner argues that the Authority acted in controvention of two legal requirements:

1) The project area was not blighted;
2) The Authority did not have in its possession a certificate personally signed by the Secretary of HUD that the objectives of renewal could not be achieved by rehabilitation.

The issue of blight was one of the major contentions by both parties throughout the trial. Evidence was presented

pro and con. The Hotel's principal argument was a mathematical calculation purporting to show that a certain per cent of the area was not blighted. The Trial Court properly instructed the jury that there was no mathematical formula to determine blight. The jury verdict was in favor of the Respondent. The Commonwealth Court did not discuss the matter. The Petitioner has never cited any authority to substantiate its argument.

The Petitioner persists in an erroneous statement of the law when he argues that the Federal Statute "requires the signature of the Secretary of HUD" on a certification that the objectives could not be achieved by rehabilitation. The law only requires that a determination of such be made by the Secretary. 42 USCA 1460(c). It does not set forth how that determination shall be evidenced. The Contract for Loan and Grant between the United States and the Authority indicates that all determinations were made by the Secretary when the Contract was executed. This Contract was signed on behalf of United States of America, Secretary of HUD by the Assistant Regional Administrator for Renewal Assistance.

The Secretary of HUD is specifically authorized by statute to delegate any of his functions, powers and duties. He may authorize such successive redelegations of such functions, powers and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers and duties. 42 USCA 3535(d).

The Petitioner now relies on *U. S. v. Giordano*, 94 S. Ct. 1820, for the proposition that where a statute vests certain authority or responsibility in a particular executive official of government that such an official must personally per-

form or execute the subject function. Despite the fact that the trial record, complete with a detailed explanation and verification that the statutory determination was made, the Petitioner persists in the false assumption that because the Authority did not have in its possession a certificate personally signed by Secretary of HUD that the determination was not made. The Petitioner concedes this is a delegable duty under 42 USCA 3535(d).

In *U. S. v. Giordano*, the Court specifically noted that the Attorney General has authority to delegate the performance of any function of his office to subordinates. A major portion of the Court's Opinion is a detailed discussion of the legislative history and congressional intent on the specific limitations imposed on the Attorney General and any Assistant Attorney General he might designate to authorize the requisite application for a wiretap. The Court noted therein that the purpose of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 USC Sections 2510-2520, was to prohibit wiretapping and to impose criminal and civil penalties therefor. The exceptions allowed are the authorization for the Government's invasion of the individual's right of privacy. The Court pointed out that the Act is not as clear in some respects as it might be. Later, the Court concluded from the scheme of the Act and the detailed legislative history and not from the language of the law that to construe it to permit the Attorney General to delegate his authority at will is contrary to the expressed congressional intent.

The Petitioner cites *Western Addition Community Organization v. Romney*, 320 F. Supp. 308 (1969). Therein the Secretary, unlike the instant case, never made any de-

termination one way or the other. Then one year after the local agency submitted the plan, the Secretary of HUD made what purported to be an expression of satisfaction with the local agency's assurance. The Court found it really to be a letter of dissatisfaction. In the Western Addition Case the Court specifically noted that the later action by the Secretary of HUD, then Robert Weaver, was taken by him acting through his Regional Administrator. In the case at hand, the Assistant Regional Administrator executed the necessary determination. There is no evidence in this case that the Authority acted in any manner except in compliance with all statutory requirements. As a result thereof, the Loan and Grant Contract in the amount of 1.4 Million Dollars was carried out.

Finally, the Petitioner argues that the Authority did not acquire all properties in the project area. Therefore, the Petitioner should have the right to retain his property and be allowed "self-rehabilitation," whatever that is. From *Berman v. Parker, id.* to *Leo Realty Co. v. Redevelopment Authority*, etc., a Pa. Cmwlth. Ct. Case reported at 320 A2d 149, decided June 4, 1974, it has been consistently held that a building which may be structurally sound or innocuous may be taken by eminent domain where the authority did not act in bad faith. Further, in *Berman v. Parker*, this Court said it was not "the function of the Court to sort and choose from among the various parcels selected for condemnation."

The evidence in this case indicates that there was no property in the project area which was the beneficiary of a rehabilitation program. There is no evidence whatsoever of bad faith on the part of any member of the Redevelopment Authority. The Petitioner is seeking preferential treatment, *ie.*, "self-rehabilitation."

The Redevelopment Authority of the City of Butler has acted solely in the regular course of administration, according to the proscribed forms and in accord with the general rules for the protection of the condemnee's rights.

Summary

This Court should not assume jurisdiction to review the refusal of the Supreme Court of Pennsylvania to hear the Appeal from the Commonwealth Court. There is no overriding special or important issue presented in this Petition. The Authority did not depart from accepted and usual course of proceedings so as to treat the Hotel in an unfair manner in this condemnation. This Petition raises only the issue of denial of due process and equal protection of laws based on the allegations of bad faith and arbitrary and capricious actions by the Authority. Both issues were submitted to a jury as the trier of fact and a verdict on the same was rendered in favor of the Authority. Certiorari should be denied.

Respectfully submitted,

MARTIN J. O'BRIEN,
Attorney for Respondent.